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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

Arzie Ellis, Jr.
Petitioner

vs.

Wallace F. Hill, *et al.*,
Respondents

On Petition For Writ Of Certiorari
To the United States Court of Appeals for
the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the Petitioner was charged with murder but was convicted of manslaughter by a jury:

1. Did the trial court meet the requirements of *United States v. Bagley*, 473 U.S. 667 (1985), concerning the production of "impeachment evidence" that is "material" when it refused to require the production of a personal file of a Tuskegee police officer who was also a material witness to a murder case when defendant had reason to believe that this witness was himself involved in criminal activity and that the nature of such involvement could be used to impeach the witness such that the determination of the guilt of the Petitioner would be affected ?

2. Was it a violation of the Sixth Amendment to the Constitution of the United States for the trial court to fail to require the production of another off-duty police officer as a witness when that witness was an eye witness to the alleged murder, had been subpoenaed, but did not honor the subpoena?

3. Are the due process requirements behind *Brady v. Maryland,* 373 U.S. 83, 87 (1963) violated when the criminal investigating agency withholds information from the District Attorney to prevent invocation of the *Brady* rule?

4. Did Petitioner meet the requirements for the issuance of a certificate of appealability as set out in 28 U.S.C. § 2253(c) and *Barefoot v. Estelle*, 463 U.S. 880 (1983), given an affirmative answer to issues 1, 2, or 3 above?

PARTIES

Petitioner ARZIE ELLIS, Jr, is a natural person. The respondents are certain officials of the State of Alabama. They are WALLACE F. HILL, Probation & Parole Officer, WILLIAM C. YOUNG, Executive Director of Pardon & Parol Board of State of Alabama, BILL PRYOR, Attorney General of the State of Alabama. All respondents are sued and are acting in their official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Arzie Ellis, Jr. prays that a Writ of Certiorari issue to review the order of the United State Court of Appeal for the Eleventh Circuit entered in this proceeding.

CITATIONS TO OPINIONS BELOW

All the relevant opinions in this case appear in the appendix to this petition. The order of the United States Court of Appeal for the Eleventh Circuit is found in the appendix hereto at Appendix, page 38a. (Hereinafter, App.,) The Recommendation of the Magistrate Judge was filed in the Middle District of Alabama on April 22, 1996. (App., 20a) The opinion of the Alabama Court of Criminal Appeals is published at 641 So.2nd 333 (Ala. Crim. App. 1995). (App., 2a)

JURISDICTION

The decision of the United States Court of Appeal for the Eleventh Circuit was filed on September 11, 1997. A motion for extension of time to file a Petition for Writ of Certiorari was filed by Petitioner on December 10, 1997. That Motion was granted by order of Circuit Justice Kennedy, and Petitioner was given until January 15, 1998 to file. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

The Constitution of the United States.
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Habeas Corpus: 28 U.S.C. § 2253(c).
Appeal

(c)(1) Unless a circuit justice or judge issues a certificate appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required y paragraph (2).

STATEMENT OF THE CASE

Proceedings Below

Petitioner, Arzie Ellis, Jr. was indicted for murder in Macon County, Alabama. After his first trial, which resulted in a mistrial, Petitioner was tried a second time in 1992 and found guilty of manslaughter. He was sentenced to ten years of imprisonment. This sentence was suspended and he was placed on probation. He was also fined $10,000, was ordered to pay $10,000 to the Crime Victims' Compensation Fund, and required to make restitution to the family of $8,379.62. (App., 2a)[1]

Petitioner filed a motion for new trial with the Circuit Court of Macon County, Alabama, which was denied by the trial judge. (App., 9a & 27a)

Petitioner appealed this decision to the Alabama Court of Criminal Appeals contending, *inter alia*, that the State withheld exculpatory evidence from him in

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[1] In addition to the formal punishment described, Petitioner lost his employment at the Veterans Administration Hospital in Tuskegee, Alabama, which he had held for several years before this incident. With his conviction, it is unlikely he will ever be employed in his chosen profession again.

violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he alleged that because the trial court did not order an *in camera* review of a second personnel file of a police officer who was a material witness, Petitioner was denied the right to fully cross-examine said witness and that information likely in that file was exculpatory evidence.

In addition, Petitioner alleged that by failing to require a subpoenaed witness to testify at a hearing on the motion for new trial, his Sixth Amendment rights were violated. The Alabama Court of Criminal Appeals affirmed the judgment of the Circuit Court of Macon County, Alabama. (App., 2a)

A petition for a writ of certiorari to the Alabama Supreme Court was denied on April 29, 1994. (App., 19a)

Petitioner than sought *habeas corpus* relief in the United States District Court for the Middle District of Alabama pursuant to 28 U.S.C. § 2254. On August 22, 1996, the U.S. Magistrate issued a recommendation that the petition be denied (App., 20a), which was affirmed by the District Court on September 27, 1996 (App., 33a)

Petitioner then sought an appeal to the United States Court of Appeals for the Eleventh Circuit, which treated his appeal as a motion for a certificate of probable cause. The Court denied his petition for the

certificate of probable cause on September 11, 1997.[2] (App., 38a)

Statement of Facts

Petitioner was charged with the murder of Harold Conner. The charged resulted from a bar fight between two customers.

Petitioner was the owner of the Turning Point Lounge located in Tuskegee, Alabama. Early in the morning of July 26, 1991, a fight occurred between two customers of the lounge; Mr. Jerry "Man-Man" Thomas and Mr. Harold Conner.

The evidence at trial showed that Mr. Conner was intoxicated and under the influence of cocaine and marijuana. The toxicology report showed Mr. Conner's blood contained 0.181% ethyl alcohol, his vitreous humor contained 0.201% ethyl alcohol, and his urine contained cannabinoids, cocaine metabolites, and concaine.

Petitioner had never met Mr. Conner nor did he know his name until sometime after the incident. There were two off-duty police officers in the lounge at the time of the incident. Neither tried to break up the fight between Petitioner and Mr. Conner.

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[2] It is not completely clear if the 11th Circuit was acting under the old 28 U.S.C. § 2253 or the new 28 U.S.C. § 2253(c) enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132), which uses the word "appealability" rather than "probable cause."

The Petitioner tried to break up the fight, and as a result the Petitioner and Mr. Conner began to struggle. Petitioner was attacked twice by Mr. Conner with a bar stool. Petitioner pulled a weapon and had Mr. Conner " . . . on the floor, straddled, straight on his right side." (App., 3a-4a and 22a-22a) Then tensions began to ease but when the two men rose from the floor, Mr. Conner made what Petitioner testified to as a "motion" and Mr. Conner began to question why Petitioner had pulled his weapon. (App., 4a & 21a)

Michael Clements, an off-duty Tuskegee police sergeant who was at the club on the night of the shooting,[3] testified that the victim made a second motion:

> The same type of motion . . . He said, man, why you pull the gun. Okay. As he made the second motion, he moved around. They are both, like, side by side. Mr. Ellis [Petitioner] at that time backed up slightly - - just slightly off, maybe - - - appeared to me as like being off balance.

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[3] Petitioner agrees that Officer Clements was at the Turning Point on the night of the incident but alleged at trial that he had left the bar shortly before the incident and did not return until later. Thus, Officer Clements could not have been an eye-witness to the events, as he claims. This is buttressed by the fact that Officer Clements testified that the bar was relatively empty when all the other witnesses' said the bar was very crowded. (App., 26a)

> He directed the revolver directly toward his abdomen . . . discharged the weapon.

(App., 22a)

As the U.S. Magistrate pointed out, this was very damaging to Petitioner's self-defense theory. (App., 22a)

The Petitioner sought to impeach Officer Clements. Petitioner had information and believed that Officer Clements had been suspended from the police department because Officer Clemens and another police officer had arrested a person on some charge, had taken him to jail, and before the arrestee could make bond, Officer Clemens and the other officer returned to the arrestee's home and stole the property of the arrestee. It is alleged that Officer Clements and others were involved in a scheme in which a home of a resident of Macon County would be called and a request made that the residents all come to Tuskegee to the police station (not an unusual suggestion in a small, rural county). While they were out of the house, the house would be robbed.

There is no doubt that Officer Clements was involved extensively with pawn shops in the area, as the chief of police admitted. The chief of police, however, described these transactions as "lawful" and the allegations as "mere rumor."[4] (App., 23a, 44a-47a)

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[4] Indeed, the police chief was issued a subpoena *duces tecum* to bring all the personnel records of Officer Clements to the hearing. This he failed to do. The trial judge sent the chief

In order to help show the prejudice and to impeach Officer Clements, Petitioner sought to have the personnel file of officer Clements produced. One file was produced and reviewed by the trial judge *in camera,* which did not show, according to the trial judge, any exculpatory evidence or basis of impeachment. (App., 23a)

A second file was not produced, although subpoenaed by Petitioner. The chief of police represented that the file, kept in City Hall, was identical to the one already produced and reviewed by the court *in camera*. (App., 23a)

In addition to the above, Petitioner sought to have disclosed information about Officer Clements having arrested a man who was out on bond because the two men were arguing over a woman. (App., 25a, 43a)

As the U.S. Magistrate pointed out, the Trial Judge expressed concerns about the actions of Officer Clements during the shooting. The Trial Judge also expressed concerns about Officer Clements using his official position to further his personal interests when

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of police in the company of a deputy sheriff back to the station to obtain the personnel records of Officer Clements. He did this and the court reviewed them and stated that there was no exculpatory or impeachable evidence in that file. But, of course, the other personnel record of Officer Clements, located at the Tuskegee City Hall, was not produced. Nonetheless, the chief of police was allowed to testify that there was nothing in the record at the City Hall that was different from the record he was forced to produce. (App., 23a)

he arrested a person that the trial judge had just released on bond. (App., 25a-26a and 39a-43a)

The Trial Judge stated, again as noted by the Magistrate, that:

> THE COURT: And he testified that he wasn't drinking. And Officer Clements is singled out among all of the witnesses. I have had a parade of witnesses come across the stand, and the one police officer who testified and was supposedly and eye witness said that it was a very slack crowd that night. Everyone else knows that there were a couple hundred people in there.
>
> Makes Officer Clements - - it makes it awfully tempting for the Court to read the charge . . . I'm not going to give that charge, but I can understand why it was requested, having heard all of the evidence in the case.

(App., 26a)

Officer Clements instructed the police to arrest Petitioner. The Tuskegee Police investigated the incident. Dozens of witnesses were interviewed but many of the statements of these interviews were not in the investigation file given to the District Attorney.

Officer Michael Johnson was also at the Turning Point at the time of the incident. He, too, was off-duty.

Officer Johnson was a former Macon County Deputy Sheriff. At the time of the trial, however, Officer Johnson was a police officer with the Lanett, Alabama Police Department. (App., 27a)

In April of 1992, Officer Johnson had a conversation with trial counsel for Petitioner. Officer Johnson told counsel that he had been at the Turning Point and saw the incident and that he, Officer Johnson, would have done the same as Petitioner had done. Just as that conversation was concluded, Officer Johnson was called into the district attorney's office. Thereafter, Officer Johnson was completely uncooperative with Petitioner's counsel. (App., 27a)

The State subpoenaed Officer Johnson for trial yet did not indicate to Petitioner that it had any exculpatory evidence from Officer Johnson.[5] At trial, Officer Johnson was not called as a witness by the State.

At the motion for new trial, filed by Petitioner, Officer Johnson was subpoenaed by Petitioner but did not appear for the hearing. Moreover, the trial judge refused to enforce the subpoena for Officer Johnson.

The district attorney informed the trial court that Officer Johnson was equally uncooperative with him and that when questioned about what he knew told the district attorney that he was "drunk" at the time. (App., 10a)

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[5] Petitioner did not subpoena Officer Johnson for trial but the State of Alabama did subpoena him.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of certiorari because Petitioner has shown that a substantial federal constitutional right was denied him in several ways and that he is entitled to a certificate of appealability to appeal pursuant to 28 U.S.C. 2253(c).

Congress established a requirement that a person seeking *habeas corpus* relief in federal court from a state sentence first obtain a certificate of appealability appeal. 28 U.S.C. § 2253(c). That standard is stated in *Barefoot v. Estelle*, 463 U.S. 880, 882 (1983) as follows:

> . . . a certificate of probable cause requires petitioner to make a "substantial showing of the denial of [a] federal right." (citations omitted)

As this Court summarized in note 4, *Barefoot*, 463 U.S. at 893:

> . . . the petitioner must demonstrate that the issues are debatable among jurists of reason; that a court **could** resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further." (emphasis in original) (citations omitted)

Failure of the prosecution to turn over evidence favorable to the accused and that is material either to guilt or to punishment is a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Brady's* rule is based on due process and requires the prosecutor to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. Failure to disclose impeachment evidence is, likewise, a violation of the *Brady* rule. *United States v. Bagley*, 473 U.S. 667, 675-676 (1985).

A violation of this standard would be a violation of a substantial federal right and would meet the standard for an issuance of a certificate of probable cause to appeal.

Exculpatory and impeachment evidence was withheld from Petitioner in several incidences. In addition, this case raises the disturbing issue of a police officer and police department failing to turn over documentary evidence to a district attorney so that the *Brady* rule would not be invoked.

Officer Clements:

Officer Clements claims to be an eye witness to the shooting and gave the only evidence that in any way was inconsistent with Petitioner's theory of self-defense. Officer Clements made no effort to stop the fight.

In addition, Petitioner had information that Officer Clements had been buying and selling stolen property. The Chief of Police thought that the rumors started because Clements was a hustler and had made

several purchases from pawn shops and was selling the property. The chief said he stopped Officer Clements from doing that, including giving up his jobbers license. (App., 44a-47a)

There is also the issue of Officer Clements arresting a man just minutes after that man being released on bond. (App., 41a-43a)

Yet none of this information was in Officer Clements' personnel file kept by the police chief. And the second file kept in City Hall was not produced and Petitioner's subpoena to produce this file was not enforced. Petitioner, therefore, does not know what was in that file although he has presented sufficient facts, which were partiality confirmed by the police chief, of impeachable evidence.[6]

All this information was kept from the jury and was not produced to Petitioner in response to his discovery request and, thus, failed to comply with *Brady, supra.* Moreover, Petitioner's trial counsel was not allowed to delve into these matters on cross-examination.

Officer Johnson:

The evidence shows, without dispute, that twice Officer Johnson, who had stated favorable evidence for

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[6] At the time of the criminal trial subject of the petition, a civil suit for damages was pending against the City of Tuskegee by the family of Mr. Connor arising out of this incident.

Petitioner, was subpoenaed but did not comply with the subpoena.

Petitioner can show the following about Officer Michael Johnson.

1. While standing outside the District Attorney's office he made a statement very favorable to Petitioner - that he saw the incident and that he would have done the same as Petitioner. (App., 45a-46a

2. Immediately after making this statement to Petitioner's trial counsel, Officer Johnson then went into the District Attorney's office and had a conversation. (App., 27a)

3. After the conversation with the District Attorney, Officer Johnson refuses to cooperate with Petitioner. (App., 27a)

4. The State subpoenas Officer Johnson for trial but he did not show up. (App., 27a-28a)

5. Nonetheless, the District Attorney, who subpoenaed Officer Johnson, says that the only information he had from Officer Johnson was that Officer Johnson was drunk and that he had no favorable information about the Petitioner from Officer Johnson. (App., 27a-28a)

6. Officer Johnson failed to honor a subpoena from Petitioner at Petitioner's hearing on his motion for a new trial. (App., 27a-28a)

7. The trial judge refused to enforce the subpoena that was issued by Petitioner. (App., 27a-28a)

Two issues are raised given these facts.

First, if the District Attorney had no information at all from Officer Johnson other than that Officer Johnson was drunk at the time of the incident, why did he subpoena Officer Johnson in both trials of petitioner? In any event, Petitioner demonstrated the nature of the favorable evidence he was seeking, who the witness was, and that the witness had talked to the District Attorney.

Petitioner thus met the standard of showing that there was evidence in the possession of the subpoenaed witness that bore on the guilt or innocense of Petitioner. Petitioner need not explain why, after talking to the District Attorney, the witness became uncooperative.

Second, Petitioner was unable through the use of compulsory process to have the testimony of Officer Johnson at trial (even though the State had issued the subpoena) or to have that testimony at a motion for a new trial. Officer Johnson was served with the subpoena by Petitioner but did not honor the subpoena. The trial judge refused to enforce the subpoena by sending for Officer Johnson. Instead, the trial court

took the representation statement of the District Attorney that Officer Johnson did not have any exculpatory evidence and that Officer Johnson was equally uncooperative with the District Attorney, even though the District Attorney had twice subpoenaed Officer Johnson.

Unconstitutional Restriction on Cross-examination

Petitioner's constitutional right to cross-examine witnesses was denied him because information that could be used to impeach Officer Clements was withheld from Petitioner and because the trial court impermissibly limited Petitioner's right to cross-examination about possible criminal and unethical matters involving Officer Clements.

This Court has made clear that the right of cross-examination is more than a desirable rule of trial but is a " . . . constitutional right of confrontation . . . ." *Chambers v. Mississippi*, 410 U.S. 284, 295 1973). Further, the right to confront witnesses means " . . . more than being allowed to confront the witness physically." A trial court's restrictions on the scope of cross-examination invoke the Confrontation Clause of the Sixth Amendment when such restrictions "effectively . . . emasculate the right of cross-examination itself." *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985).

Failure to allow the *in camera* review of a file of a prosecution witness for impeachable evidence unduly restricts cross-examination in violation of the Sixth

Amendment. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), this Court held that the right to confrontation is a trial right, designed to prevent improper restrictions on the type of questions that defense counsel may ask during cross-examination. "Criminal defendants have a right to put before a jury evidence that might influence the determination of guilt." *Ritchie*, 480 U.S. at 56. In *Richie* this Court affirmed the decision of the Pennsylvania Supreme Court to the extent that it allowed Richie to have the trial court review a Children and Youth Services file to determine whether that file contained any information that would have changed the outcome of the trial. *Ritchie,* 480 U.S. at 58. If it did, Ritchie would be entitled to a new trial. It is true that the Court in *Ritchie* used the Fourteenth Amendment due process analysis and held that the compulsory process provides no greater protection than the due process analysis. *Ritchie*, 480 U.S. at 56. Nonetheless, *Ritchie* shows it is a constitutional error requiring a new trial for the trial court to refuse to review a file *in camera* where the defendant, as here, has shown that there is likely evidence that can impeach a witness and thus put evidence before a jury that might influence the determination of guilt.

In *Davis v. Alaska*, 415 U.S. 308 (1974) this Court allowed the use of a juvenile record to produced for the purpose of impeachment cross-examination of a prior criminal record over Alaska's concern for the protection of juveniles anonymity. This Court held that ". . . the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness" and that failure to allow defendant to cross-examination about possible bias because the witness who was on probation as a

juvenile delinquent violated the confrontation clause of the Sixth Amendment and Fourteenth Amendments. *Davis*, 415 U.S. at 317.

Failure to Allow Compulsory Process

By not requiring Officer Johnson to appear after he failed to honor the subpoena of Petitioner, the trial court violated Petitioner's Sixth Amendment rights to have compulsory process for obtaining witnesses in his favor.

In *Pennsylvania v. Ritchie, Supra*, this court said, in reviewing the specific rights under the Sixth Amendment, that

> . . . criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.

Ritchie, 480 U.S. at 56. It takes little argument to show that when the trial court refused to require Officer Johnson to comply with one of at least two subpoena's he received upon a showing by Petitioner that Officer Johnson had stated evidence vary favorable to him that Petitioner's Sixth Amendment rights have been significantly violated.

Likewise, the failure of the court to require the production for *in camera* review of the personnel file of Officer Clements violates Petitioner's Sixth Amendment

rights. Once Petitioner made a showing of the nature of the impeachable evidence, the nature of which was at least confirmed by the police chief, Petitioner had a right to have the personnel file of Officer Clements brought to the court house for *in camera* review by the trial judge. The failure of the police chief to honor the subpoena *duces tecum* without the court having to send the chief of police back to his office in the accompaniment of a deputy sheriff raises the question of the reluctance of the chief of police to make public the actions of
Officer Clements. In any event, Petitioner made a significant enough showing that the file not produced could have contain evidence that put before a jury ". . . might influence the determination of guilt." *Ritchie*, *supra*, 480 U.S. at 56.

Failure to Produce Exculpatory Evidence

The analysis above concerning the Sixth Amendment violations by failing to enforce a subpoena for Officer Johnson and failing to produce information about Officer Clements violates the standard of *Brady v. Maryland*, 373 U.S. 83 (1963).

The Magistrate's conclusions on this point are contrary to the holdings of this Court and on the facts of this case. The Magistrate concluded that Petitioner did not make a plausible showing of how . . . [the] testimony would have been both material and favorable to his defense, quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), even though Petitioner quoted exactly what Officer Johnson had said to Petitioner's trial counsel and that statement

was very favorable to Petitioner. To say that Petitioner had not made a plausible showing materiality or how the evidence would be favorable to Petitioner is absurd on its face and contrary to the holdings of this Court in *Ritchie, supra, Davis, and Bagley, supra.* discussed above. The statement that "I saw what happened and I would have done the same" as the Petitioner had done is powerful testimony that favors the Petitioner.

Likewise, the failure to produce the second personnel file of Officer Clements discussed above, which should have contained the information concerning his improper and perhaps criminal activities, also violates the *Brady* requirement.

In both cases the evidence, if produced, would have put the whole case in a different light and would affect the finding of guilt by the jury. *See, Kyles v. Whitley,* 514 U.S. _, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Withholding this evidence violates a fundamental constitutional right of Petitioner.

The several rulings by the trial court put Petitioner in an situation that makes securing his constitutional rights illusory. On one hand the Petitioner is told that he has not shown testimony that is material and favorable to him and thus is not entitled to have the exculpatory evidence produced. (App., 23a-26a, 28a-29a) On the other, Petitioner is told that because he has equal access to the exculpatory information himself from the Officer Johnson that such testimony need not be turned over by the district attorney. (App., 28a-29a) Yet Petitioner was not allowed by the trial court to compel the attendance of

Officer Johnson who has the evidence. (App., 29a) Likewise, Petitioner was not allowed to compel the production for *in camera* review of the second personnel of Officer Clements. (App., 23a) The Constitution and this Court's decisions do not allow the prosecution to have it both ways.

In addition, it appears that other evidence that was requested was not turned over. The problem this raises is that it appears that local authorities were withholding evidence from the district attorney in order to keep the *Brady* rule from being invoked.

No interviews, apparently, were turned over to the district attorney. Even though there were over 200 people present at the Lounge the night of the incident, there must have been more people interviewed than the witnesses actually called. Yet apparently none of these interviews were in the possession of the district attorney.

The continued reluctance of the chief of police to produce the personnel files of Officer Clements supports the conclusion that the City of Tuskegee was very concerned about a civil suit filed against it arising out of this matter and thus was reluctant to give to the district attorney information that could end up with in the possession of Petitioner or the plaintiff's in the civil matter.

Indeed, the trial judge himself launched into a soliloquy about the serious problems and police incompetence in this case.

> THE COURT:
> Okay. Well, that's good. Because this case **is an embarrassment to public justice in many ways.** It's a case that has to go on and be tried. It's a serious matter. Somebody has been killed here. But, on the one hand, Officer Clements probably didn't have any responsibility to intervene simply because of his accidental presence. But his other conduct, you know, leads it to be a question of a way of handling it. If it wasn't appropriate for him to be involved in the case, then why did he inject himself into it and try to take the man's gun from him, you know, at that point in time. There are just all sorts of questions. **Once you embark on a pattern of conduct that's loose and not professional, then it's very hard to get back on track is the unfortunate thing about it.** Did Officer Clements testify that at that point in time that there were only thirty or forty people in the club?

(App., 42a) (emphasis added)

Overall there is a pattern of refusing to allow the production of or the cross examination about information in the possession of the investigators of this case that is damaging to the City of Tuskegee. This is a direct violation of Petitioners fundamental constitutional rights.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit that denied Petitioner's petition for a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

Respectfully submitted,

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THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1993-94

CR 92-1126 [Released Jan 21, 1994]

Arzie Ellis, Jr.

V

State

Appeal from Macon Circuit Court
CC-91-126

BOWEN, PRESIDING JUDGE

Arzie Ellis, Jr., the appellant, was indicted for the murder of Harold Conner. He was convicted of manslaughter and was sentenced to ten year's imprisonment. The appellant's sentence was suspended and he was placed on probation. He was fined $10,000 and was ordered to pay $10,000 to the Crime Victims' Compensation Fund and to make restitution in the amount of $8,379.62. He raises seven issues on this direct appeal of that conviction.

I

The appellant challenges both the sufficiency and the weight of the evidence, claiming that neither supports a conviction for manslaughter. The sufficiency issue has not been preserved for appellate review because at the close of the State's case, the appellant made the following motion:

> "I make a motion for a judgment of acquittal at this time, and my motion is that the State has just not proved that the defendant is guilty of murder. There may be some question about manslaughter, but there's just not sufficient evidence to go to the jury on the charge of murder." R. 261.

As this court observed in *Washington v. State*, 555 So.2d 347, 348 (Ala. Cr. App. 1989):

> "The appellant's motion for judgment of acquittal for murder will not preserve for review the appellant's challenge to the sufficiency of the evidence for manslaughter. Where appellant specifically challenges the sufficiency of evidence of murder, and failed to object concerning manslaughter, he has waived this issue for review."

Even if this issue had been properly preserved, the appellant could not prevail on his claim. The

evidence was clearly sufficient to present jury questions on the issues of murder, self-defense, and manslaughter The appellant was the proprietor of the Turning Point, a lounge in Tuskegee, Alabama. In the early morning hours of July 26, 1991, a fight broke out between two patrons of the lounge, Jerry Thomas and Harold Conner. The appellant intervened to break up the fight, and he and Conner began to tussle. The appellant pulled a gun and shot Conner.

The testimony regarding whether Conner threatened the appellant7 swung at the appellant, or was advancing on the appellant with a chair before the appellant shot him was in conflict. The evidence presented questions of fact that were correctly submitted to the jury. See *McCain V. State*, 611 So.2d 1123, 1124-25 (Ala. Cr. App. 1992). A verdict rendered on conflicting evidence will not be overturned on appeal. "We have repeatedly held that it is not the province of this court to reweigh the evidence presented at trial." *Johnson v. State*, 555 So.2d 818, 820 (Ala. Cr. App. 1989).

> "This court is not 'jury number two.' It is not the business of this court to second-guess juries. We hold that the jury's verdict was not contrary to the great weight of the evidence."

Smith v. State, 604 So.2d 434, 436 (Ala. Cr. App. 1992).

II

At the time of his death, Harold Conner had in his pocket a plastic bag containing a "compressed, off-white material." R. 326. At trial, both the deputy coroner and the forensic toxicologist testified that the material appeared to be crack cocaine. However, testing had revealed that the material was not crack cocaine or any other controlled substance, but was instead "something like paraffin." R. 328. Defense counsel asked the toxicologist, "[H]ave you investigated cases where this type of substance has been sold as cocaine?" R. 328. The assistant district attorney objected to this question and the trial court sustained the objection.

The appellant argues that the question called for relevant evidence because the answer would have given the jury "an insight into the state of mind and character of Mr. Conner, i.e., [that] he was a person dealing in illegal drugs or counterfeits thereof. Such a person, particularly while under the influence of drugs, would be dangerous." Brief of Appellant at 49.

There was no error in the court's ruling on the objection. "[F]act A is relevant if there is any logical relationship between it and the ultimate inference B for which it is offered." C. Gamble, *McElroy's Alabama Evidence*, §21.01(1) at 34 (4th ed. 1991). Although there is some logical relationship between the fact that the victim had a substance resembling cocaine in his

pocket and the inference that he was a seller of counterfeit drugs (the victim could just as well have been a purchaser of the counterfeit substance), there is no logical relationship between the fact that the victim possessed a counterfeit controlled substance and the inference that the victim was either "under the influence of drugs" or "dangerous." See *Winton v. State*, 563 So.2d 22, 24 (Ala. Cr. App. 1990) (fact that murder victim sold cocaine irrelevant).

Furthermore, the appellant had the benefit of testimony by forensic toxicologist Laura Shevlin that, at the time of Conner's death, not only was Conner's blood alcohol content .18%, but also his

> "urine specimen was found to contain cocaine, . . . a number of metabolites of cocaine, [and] one metabolite of marihuana." R. 338.

Shevlm also gave the following testimony regarding Conner's use of cocaine prior to his death:

> "[The presence of cocaine metabolites in the urine] suggests that Mr. Conner . . . was not under the influence of cocaine at the time of his death. Cocaine, particularly crack cocaine, has an extremely short period when it is active in the body. Users of crack cocaine report that the high lasts

only fifteen to twenty minutes, and in some cases less." R. 339.

"By not finding any cocaine in the blood, I can say that he was not under the influence of cocaine at the time [of his death], but he may have been as recently as thirty minutes to an hour beforehand." R. 340.

"0. [By Defense Counsel]: All right. But from the test you found, then Mr. Conner had been using crack or cocaine at some time not too remote from the time he died; is that right?

"A. That's correct. There was quite a bit identified in the urine. It was a high level in the urine." R. 341-42.

III

The appellant's character witness, an Alabama Alcoholic Beverage Control Board enforcement agent, testified that he had known the appellant for a number of years and that he had processed the appellant's application for a liquor license. He stated that the

appellant's reputation for peace and quiet was good. On cross-examination, the witness testified, without objection by the defense, that he had some complaints about the Turning Point lounge, the appellant's club.

On redirect, defense counsel asked whether the witness had ever substantiated any of the complaints about the appellant's club. The prosecutor objected and the court sustained the objection, commenting, "The club is not on trial here." R. 352- 53. Defense counsel then moved to strike the testimony elicited earlier on cross-examination that there had been complaints about the club. The trial court denied that, request.

"This was proper as a motion to exclude will not preserve error in the admission of evidence where no timely objection has been made at the time of its admission." *Coon v. State,* 432 So.2d 558, 559 (Ala.Cr.App. 1983). Error cannot be predicated upon the court's failure to strike a witness's responsive answer to a question for which there was no objection. *Milligan v. State,* 208 Ala. 223, 227, 94 So. 169, 172 (1922).

IV

The appellant contends that the State withheld exculpatory evidence from him, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He claims that the trial court erred by failing to conduct an in camera inspection of the prosecutor's files

to determine whether such evidence existed, and by failing to require a subpoenaed witness to testify at the hearing on his motion for a new trial.

Lanett police officer Michael Johnson was in the Turning Point lounge when the shooting occurred. Before trial, Officer Johnson told the appellant's attorney that he was present, that he saw the shooting, and that he "would have done the same thing [the appellant] did." R. 494. Defense counsel stated that he attempted to discuss the matter further with Officer Johnson, but Johnson refused to talk to him. At trial, Officer Johnson was subpoenaed as a State's witness, but he did not testify.

Theorizing that the State did not call Officer Johnson as a witness because Johnson had exculpatory information, defense counsel made a motion at the close of the State's case for the State to produce any statement made by Officer Johnson. The trial court denied that motion. Defense counsel then asked the court to conduct an in camera inspection of the prosecutor's file to determine if any exculpatory statement by O£ficer Johnson existed.

The assistant district attorney replied that he would be glad to show the court his file. The court inquired, "Do you have any exculpatory information that you have not disclosed?" and the prosecutor responded, "No, sir. In fact, this is the case that I allowed [defense

counsel] to look at my file just before we got ready to go to trial." R. 263-64. The court then denied the motion for in camera inspection.

Defense counsel subpoenaed Officer Johnson for the hearing on his motion for a new trial. Johnson was served with the subpoena but he did not appear for the hearing. The appellant asked the court to send for Johnson and the court refused.

Before ruling that he would not send for Johnson, the court asked the assistant district attorney, "Do y'all have a statement made by Michael Johnson?" The prosecutor replied:

> "No sir. Your Honor, Mr. Johnson was equally uncooperative with us. I questioned Mr. Johnson. He would not -- then D.A. '5 investigator Sid Lockhart subpoenaed him. He did not come down. He kept saying, 'I dont want to get involved.' I asked him point blank, 'Did you see anything? Do you know anything?' He said, 'No, I was drunk.' That's the extent of my conversation with him.
>
> "I said, 'Is there anything that you can add to this case? Can you give me anybody else that was there?1 'No.' And, from that

> point, Judge, I had an almost impossible time of finding him and talking to him.
>
> "He was subpoenaed for the . . . trial. I had no intention of using him, but I still wanted him there. . . . . I've had no contact with Michael Johnson, to my memory, since that day in the office. And there was nothing exculpatory or anything else that he produced. And further, [defense counsel] had talked to him. I have no statements from him." R. 497-98.

The trial court made the following findings of fact:

> "THE COURT: it would be my finding based on the district attorney's statement that there was no exculpatory evidence that was not turned over. . . . I think I understand. I think there is an explanation to officer Johnson's) reticence other than the fact that, an inference to be drawn other than the fact that the State -- that there was some exculpatory material. I think that any time a police officer is in a place like [the Turning Point lounge], it's a little bit embarrassing in the first place. And particularly if he were drunk at that point in time, I think that it would be damaging to him as a police officer." R.

499-500.

To prove a *Brady* violation, the appellant must establish 1) that the prosecution suppressed evidence, 2) that the evidence was favorable to the defense, and 3) that the evidence was material. *Ex parte Cammon*, 578 So.2d 1089, 1091 (Ala. 1991); *Ex parte Kennedy*, 472 So.2d 1106, 1110 (Ala.), cert. denied, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985):

"[T]he government's duty to provide information extends only to evidence in the possession of the prosecutor or reasonably available to him." *United States v. Stuart*, 923 F.2d 607, 612 (8th Cir.), cert. denied, 499 U.S. 967, 111 S.Ct. 1599, 113 L.Ed.2d 662 (1991). Evidence is reasonably available" to the prosecutor if it is known to him, it is contained in his own case file, or it can "be gained through reasonable inquiry of other prosecutorial personnel," *State v. Siano*, 579 A.2d 79, 83 (Conn. 1990), or if it is in the possession of a member of the prosecution team," which includes both investigative and prosecutorial personnel, '" *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir.), cert. denied, 493 U.S. 932, 110 S.Ct. 322, 107 L.ed.2d 312 (1989); accord *O'Rarden v. State*, 777 S.W.2d 455, 458 (Tex. App. 1989), and "anyone over whom [the prosecutor) has authority," *Meros*, 866 F.2d at 1309.

In the present case, Officer Johnson expressed an

exculpatory opinion to defense counsel. The State obviously did not "suppress" this information. If Officer Johnson had more exculpatory information that he did not reveal, we do not believe that the State can be charged with a Brady violation for Officer Johnson's failure to disclose it. Officer Johnson was not, for purposes of this case, a member of the "prosecution team." He was, instead, "uncooperative" with the prosecutor and stated that he did not want to "get involved." R. 497. *Compare Craig v. State*, 544 A.2d 784, 790 (Md. App. 1988), reversed on other grounds, 560 A.2d 1120 (Md. 1989), vacated on other grounds, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 665 (1990) ("close cooperation" between sexual assault counselor and office of state's attorney made counselor a member of the "prosecution team"), with *Brown v. State,* 401 S.E.2d 492, 495 (Ga.), cert. denied, U.S. ___, 112 S.Ct. 296, 116 L.Ed.2d 240 (1991) (psychiatrist not a member of the "prosecution team"). See generally *Donahoo v. State*, 552 So.2d 887, 896 (Ala.Cr.App. 1989) (information that police officer had a prior felony conviction could not be imputed to the prosecutor).

> "[The] actions of police officers, who are members of a prosecution team, are attributable to the prosecution, . . . [however, the] actions taken by such officers not in furtherance of law enforcement but rather in pursuit of a . . scheme of their own . . . are [not]

attributable to the prosecution."

Commonwealth v. Waters, 571 N.E.2d 399, 402 (Mass. 1991).

The record supports the court's finding that Officer Johnson had no exculpatory information other than what he revealed to defense counsel (that the officer was present in the lounge, that he saw the shooting, and that he "would have done the same thing [the appellant] did." R. 494). However, if Officer Johnson did have more exculpatory information, his failure to disclose it did not constitute a Brady violation because, as the trial court found, Johnson's reason for nondisclosure was a personal desire to shield himself from embarrassment rather than a reason that could be imputed to the prosecutor. As the Massachusetts court observed, for actions

> "motivated by the officers' interest in shielding themselves from the possible consequences of having visited the [defendant's place of business] for an unlawful purpose or by some other motive unrelated to law enforcement, it cannot reasonably be said that . . . the officers were functioning as representatives of the State.
>
> ". . . It is one thing to attribute to the

> prosecution the efforts of police officers to withhold pre-trial information from a defendant because of overzealousness or sloppy police work . . . . It would be quite another matter, however, to attribute to the prosecution the conduct of police officers in pursuit of their own individual . . . scheme unrelated to the Commonwealth's interest in law enforcement."

Commonwealth v. Waters, 571 N.E.2d at 402-03.

The record supports the court1s finding that Johnson was reluctant to testify in this case not because he had further exculpatory information, but because he was embarrassed about being present and intoxicated in a lounge where a homicide occurred.

The trial court did not err by refusing to conduct an in camera inspection of the prosecutor's file or by refusing to send for Officer Johnson to testify at the hearing on motion for new trial.

V

There is no merit to the appellant's contention that the State violated *Brady* by failing to disclose impeachment information contained in the personnel file of Tuskegee Police Sgt. Michael Clements.

At the hearing on the appellant's motion for a new trial, the Tuskegee chief of police brought Sgt. Clements's personnel file from the Tuskegee Police Department. The trial court examined the file and found nothing exculpatory. The appellant's attorney then requested the court to review, in camera, another file relating to Sgt. Clements kept at city hall. The court denied that request when the chief of police informed him that the city hall file contained duplicates of the material maintained by the police department.

The court's ruling was correct. There was absolutely no showing that the prosecution "suppressed" any information regarding Sgt. Clements. See *Ex parte Cammon, supra*; *Ex parte Kennedy, supra*.

VI

The appellant contends that this cause should be remanded for a new restitution hearing because the sentencing judge used restitution as a means of punishment, in violation of *Ex parte Clare*, 456 So.2d 357 (Ala. 1984). In *Clare,* the Alabama Supreme Court declared that "(the legislative intent of the restitution statute is to compensate, and not to punish." 456 So.2d at 358.

The sentencing judge's imposition of a large fine and a high Crime Victim's Compensation Fund

assessment was clearly a punitive measure.[1] However, there is no support in the record for the appellant's contention that the restitution order was punitive

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[1] The court's order on motion for reconsideration of sentence reads as follows:

> "The primary punishment meted out to the defendant for his conviction of manslaughter was a heavy financial obligation which, in the judgment of the Court, the Defendant will be able to pay over a period of time, if not immediately, through the liquidation of assets. The Court saw fit to impose a heavy burden in lieu of prison time because of the following considerations:
>
> > "1) It appears to the Court that there is small likelihood the defendant would engage in but" to other violent activities.
> >
> > "2) The taking of a human life is a very serious matter and the heavy financial obligation in lieu of a jail sentence will be of benefit to the State, to other victims and to the victims in this case." C.R. 69-70.

rather than compensatory. At the sentencing hearing, the trial judge heard testimony from the victim's parents that they had suffered financial losses as a result of the death of their son in the amount of $8,379.62, representing "funeral expenses, doctors' bills not only for the victim, Mr. Conner, as well the immediate doctor bills of the family during their time of bereavement, [and] the lost wages during their absence [from work]." R. 478.

The court awarded restitution in the amount of $8,379.62, a figure obviously intended by the court fully comme rate all victims of [the appellant's criminal] activity for any pecuniary loss, damage or injury as a direct or indirect result thereof." Ala. Code 1975, §15-18-65 (emphasis added). See *Kyser v. State,* 513 So.2d 68, 73 (Ala. Cr. App. 1987) (burial expenses, medical expenses, and lost wages suffered by manslaughter victim's mother, father, and brother proper).

The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges concur. . .

IN THE SUPREME COURT OF ALABAMA
April 29, 1994

1930831
Ex parte Arzie Ellis, Jr. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Arzie Ellis, Jr. v. State)
(92-1126) (Macon: CC-91-126)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED
that the petition for writ of certiorari is denied.

SHORES, J. - Hornsby CJ., Maddox, Steagall and

Ingram, JJ., concur.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ARZIE ELLIS	)
	) [Filed Aug 22, 1996]
Petitioner,	)
	)
v.	) CIVIL ACTION
	) NO. 94-T-13 92-E
WALLACE F. HILL, et al., et al.,	)
	)
Respondents.	)

RECOMMENDATION OF THE MAGISTRATE JUDGE

In 1992 in the Circuit Court of Macon County, Alabama, the petitioner in this 28 U.S.C. § 2254 action was indicted for murder but was convicted of manslaughter.[1] The petitioner filed a motion for new trial raising essentially the same issues he raises in this court. After a hearing the trial judge denied the motion. The petitioner's conviction was affirmed on direct appeal.[2] The Alabama Court of Criminal Appeals addressed the issues which the petitioner raises in this court.

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[1] The petitioner's first trial, not at issue here, resulted in a mistrial.

[2] *Ellis v. State,* 641 So.2d 333 (Ala. Crim. App. 1994).

The facts in this case are straightforward. The petitioner owned a lounge and during an attempt to break up a fight between two customers, he began to fight with one of the customers. During this fight the petitioner pulled a gun and shot the customer. At trial petitioner put forward the defense of self-defense.

After careful consideration of the record in this case, the court concludes that the petitioner is not entitled to relief. No evidentiary hearing is required because the facts crucial to a fair determination of the issues presented by petitioner were adequately developed in the state court proceedings. McCoy v. Wainwright 804 F.2d 1196 (11th Cir. 1986).

The Clements Exculpatory Evidence Claim

At trial Tuskegee police sergeant Michael Clements testified that he was in the lounge during the fight and witnessed the shooting.[3] He testified that petitioner and the victim "went down to the floor. Chairs, tables were displaced. Mr. Ellis pulled out a revolver. He had Mr. Conner [the victim] down of the floor, straddled, straight on his right side." Transcript at 96. Clements testified that at this point tension began to ease, but as the two men rose Conner "made a motion" *Id* at 98, and began to question why the petitioner had pulled a gun on him. Clements then describes the victim making a second motion.

The same type of motion ... He said, man, why

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[3] Clements was off duty.

> you pull the gun. Okay. As he made the second motion, he moved around. They are both, like, side by side. Mr. Ellis at that time backed up slightly --just slightly off, maybe -appeared to me as like being off balance. He directed the revolver directly toward his abdomen ... discharged the weapon.

Id.

Obviously this testimony was extremely damaging to the petitioner and his self-defense theory of the case. The petitioner contends that the prosecution violated his constitutional rights by failing to turn over to the defense information which could have been used to impeach Clements.

Under well settled constitutional law, the prosecution is required to disclose to the defense evidence favorable to the accused if the evidence is material to guilt or punishment. *Brady v. Maryland,* 373 U.S. 83 (1963); *Routly v. Singletary,* 33 F.3d 1279, 1285 (11th Cir. 1994). "Impeachment evidence ... as well as exculpatory evidence, falls within the *Brady* rule."*United States v. Bagley,* 473U.S.667,676 (1985). A successful *Brady* claim requires three elements: (1) the prosecution suppressed evidence, (2) the evidence suppressed was favorable to the defense or exculpatory, and (3) the evidence suppressed was material. *Brady,* 373 U.S. at 87; *Jacobs v. Singletary, 952* F.2d 1282, 1288 (11th Cir. 1992).

The petitioner claims that the prosecution suppressed information about Clements which would have shown that he was under investigation for buying

and selling stolen property. At the hearing on the petitioner's motion for new trial, the chief of police denied this claim and characterized the comments about Clements as mere rumor. The chief speculated that the rumors arose because Clements had been engaged in lawful dealings with pawn shops -- a practice which the chief had stopped. Notwithstanding the chief 's testimony, the trial judge reviewed Clements' personnel file and concluded that it contained no exculpatory information. This review is consistent with the suggestion in *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987).[4] The trial judge refused, however, to review another file on Clements which was maintained in a separate location. The basis of this refusal was the chief's testimony that the file was a duplicate of the file the court already had reviewed.

The petitioner's claim lacks merit. The petitioner has not come forward with any facts showing that the prosecution was aware of any unlawful activity on the part of Clements which might have cast doubt on his credibility. The petitioner has not shown the existence of any impeachment information about Clements which is "favorable"[5] to the petitioner. And finally, the petitioner has not shown that the information sought is

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[4] In *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), the court approved a trial judge's reviewing *in camera* files containing sensitive information to determine the presence *vel non of Brady* information.

[5] In this context,"favorable" means impeachment information.

"material." In *Kyles v. Whitley,* 514 U.S. _, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). the court held that under *United States v. Bagley,* four aspects of materiality for *Brady* purposes bear emphasis. For present purposes only the fourth aspect is important.

> The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item. As Justice Blackmun emphasized in the portion of his opinion written for the Court, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)...

Kyles at 1567.

In this case, there is simply no *evidence,* collective or otherwise, to consider at all. The trial court found from its review of Clements' file and after consideration of the testimony of the chief that no impeachment evidence existed. Evidence is "material" under *Brady,* and the failure to disclose it justifies setting aside a conviction, only where there exists a "reasonable probability" that had the evidence been disclosed the result at trial, would have been different. *Wood v. Bartholomew,* ___U.S. ___, 116 S.Ct.7 (1995). Obviously, this test presupposes the existence of *evidence.* The findings of the state courts that no *evidence* existed are entitled to a presumption of correctness, *Sumner v. Mata,* 449 U.S.

539 (1981). In the absence of "favorable" *evidence* the petitioner is not entitled to relief on this claim.

The petitioner also asserts in a reply brief that the prosecution should have disclosed information about Clements' arresting a person who had been released on bond because he and the person were arguing over a woman. *See* Transcript at 421.[6] During the court's charging conference with counsel, the trial judge expressed concerns about the actions of officer Clements during the shooting. The trial judge expanded his expression of concerns about Clements to discuss his displeasure at Clements using his official position to further his personal interests when he arrested a person the judge had just released on bond. Addressing directly one of the petitioner's requested jury charges,[7] the trial judge noted some concern about Clements' testimony:

THE COURT: And he testified that he wasn't

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[6] It does not appear that this particular claim was presented to the state courts. However, even though the claim is not exhausted, the court may decide it on the merits. *See* 28 U.S.C. § 2254(b)(2)("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

[7] As requested the charge was "[t]he court charges the jury that if the believe, from the evidence in this case, that the witness Michael Clements has willingly and corruptly sworn falsely as to any material fact in this case, you may, in your discretion, disregard his/her testimony entirely.

> drinking. And Officer Clements is singled out among all of the witnesses. I have had a parade of witnesses come across the stand, and the one police officer who testified and was supposedly and eye witness said that it was a very slack crowd that night. Everyone else knows that there were a couple hundred people in there.
>
> Makes Officer Clements -- it makes it awfully tempting for the Court to read the charge the charge. . I'm not going to give that charge, but I can understand why it was requested, having heard all of the evidence in the case.

Transcript at 419-420.

A "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois,* 360 U.S. 264, 269 (1959). However, it is not at all clear that evidence about Clements' conduct in an unrelated case and which is not directly related to his veracity is admissible under Alabama law for impeachment purposes. *See Snitherman v. State,* 521 So.2d 1050 (Ala. Crim. App. 1987), *cert. denied Ex parte Smitherman,* 521 So.2d 1062 (Ala. 1988). It follows, therefore, that the evidence about Clements is not material within the meaning of *Brady* because it is not *evidence* at all. *Wood v. Bartholomew,* ___U.S. ___,116 S. Ct.7(1995). Petitioner is not entitled to relief on this claim.

The Johnson Exculpatory Evidence Claim

A second police officer, Michael Johnson, was in the lounge on the night of the shooting. At the hearing on petitioner's motion for new trial his trial counsel told the court that prior to trial officer Johnson said to him that he saw the shooting and "that if he had been Arzie Ellis, he would have done the same thing that Arzie did." Transcript at 494. Nonetheless, the petitioner did not subpoena Johnson as a defense witness. Petitioner's counsel told the court that after the initial contact with Johnson, Johnson would "[a]bsolutely not talk to me." *Id.* at 495. Thereafter petitioner's counsel continued with his explanation to the trial court:

> Now the DA had him subpoenaed as a witness, and the DA did not use him as a witness ... he was a police officer ... he being the second police officer that was there that saw what happened and was not involved with the City, his testimony would have been vital and very helpful to the State. And the fact that he did not -- that the State did not choose to use him as a witness should raise the inference there must have been something helpful in Michael Johnson's testimony to the defense...

Transcript at 495-496.

In response to this argument the district attorney told the court that Johnson was equally uncooperative with him. The district attorney further told the trial court that he had no statements from Johnson except that Johnson, in response to a question about what he say, said only that he was drunk. On this record the

trial judge found that there was no exculpatory evidence that was not turned over to the defense. Transcript at 499-500.

> And you [speaking to petitioner's counsel] had the right to subpoena him. And, as you say, you didn't want to call him because you didn't know what he was going to say. But he had made a somewhat exculpatory statement to you, but you knew about it. So I just don't think there's anything there.

Based on this finding, the trial court refused to enforce a subpoena for Johnson to appear at the hearing on the motion for new trial. The petitioner claims that his constitutional rights were violated because (1) the prosecution did not make available to him Johnson's exculpatory material and (2) the trial court refused to honor the petitioner's right to compel Johnson's attendance at the hearing on the motion for new trial.[8]

The petitioner's claims lack merit. First, in *United State v. McMahon,* 715 F.2d 498 (11th Cir.), *cert. denied,* 464 U.S. 1001 (1983), the court held that a *Brady* violation does not occur if a defendant has equal

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[8] The right of the accused to present witnesses in his on defense is fundamental to the fairness of the adversary system. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049,35 L.Ed.2d 297 (1973). The court assumes that right extends to a hearing on a criminal defendant's motion for new trial.

access to the questioned material and could have found it by the exercise of reasonable diligence. *See also Mills v. Singletary,* 63 F.3d 999 (11th Cir. 1995)(No *Brady* violation where defendant had full access to material prior to trial). Here the petitioner knew of potential exculpatory information even before the prosecution. No *Brady* violation occurred. Moreover, this court may not find a violation of *Brady* based on the type of speculation in which the petitioner now engages. *Wood v. Bartholomew,* ___U.S.___, 116 S.Ct.7(1995).

The petitioner contends that the trial court violated his constitutional rights when it refused to enforce a subpoena compelling the attendance of Johnson at the hearing on the motion for new trial. In *United States v. Valenzuela--Bernal,* 458 U.S. 858, 867 (1982), the Court found no violation of the defendant's Sixth Amendment right to compulsory process when the defendant failed to "at least make some plausible showing of how. . [the] testimony would have been both material and favorable to his defense." The state, trial judge found that Johnson had no exculpatory evidence. The petitioner did not then and does not now make any plausible showing of how Johnson's testimony might have been helpful to him beyond what the petitioner already knew. The petitioner's speculations are insufficient to warrant relief.

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the petition for habeas corpus relief be denied and that this case be dismissed. It is further the RECOMMENDATION of the Magistrate Judge that the costs of this proceeding be taxed against the petitioner.

Done this 22nd day of August, 1996.

CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE

CIVIL ACTION NO. 94-T-1392-E

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982). See Stein v. Renolds Securities-Inc., 667 F.2d 33 (11th Cir. 1982). See also Bonner v. City of Prichad, 661 F.2d 1206 (11th Cir. 1981, en banc), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 22nd day of August, 1996

CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR
MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ARZIE ELLIS,	)	
	)	
Petitioner,	)	
	)	CIVIL ACTION NO.
v.	)	94-T-1392-E
	)	
WALLACE F. HILL, et al.,	)	
	)	
Respondents.	)	

ORDER

Upon consideration of the recommendation of the United States Magistrate Judge entered on August 22, 1996, and the objections filed by the petitioner on September 18, 1996; and after an independent review of the file, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That the petitioner's objections are overruled;

(2) That the recommendation of the United States Magistrate Judge is adopted;

(3) That the petition for writ of habeas corpus filed by petitioner is denied; and

(4) That costs are taxed against the petitioner, for which execution may issue.

DONE, this the 27th day of September, 1996.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 96-7046

ARZIE ELLIS, JR.,
Petitioner-Appellant,
versus
WALLACE P. HILL, Probation & Parole Officer,
WILLIAM C. YOUNG, Executive Director of
Pardon & Parole Board of State of Alabama,
JEFF SESSIONS, Attorney General for the
State of Alabama,
Respondents-Appellees,

JAMES H. EVANS, Attorney General of the
State of Alabama,
Respondent.

Appeal from the United States District Court for the
Middle District of Alabama

ORDER:

As amended by the Antiterrorism and Effective Death Penalty Act of 1995, 28 U.S.C. § 2253 provides that an appeal from a final order in a § 2254 proceeding may not be taken not be taken without a "certificate of appealability" certifying that "the applicant has made a substantial, showing of the denial of a constitutional

rights and indicating On which specific issue or issues satisfy the showing required." In addition, F.R.A.P. 22(b) provides that if an appeal is taken by a state habeas petitioner, "the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. Because the district court made no ruling with respect to a certificate of appealability, this case is hereby remanded so that the district court may consider whether a certificate of appealability is appropriate for any of the issues Ellis seeks to raise on appeal; should the court determine that the certificate should issue, it should so rule, setting forth the issues certified for appeal, per 28 U.S.C. S 2253. Should the court determine that the certificate should not issue, it is directed to "state the reasons" therefor, per F.R.A.P. 22(b).

/S/ STANLEY F. BIRCH
UNITED STATES CIRCUIT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ARZIE ELLIS,	)
	)
	)
Petitioner,	)
	)CIVIL ACTION NO.
V.	) 94-T-1392-E
	)
WALLACE F. HILL, et al.,	)
	)
Respondents.	)

ORDER

On October 22, 1996, petitioner filed a notice of appeal from this court's order of September 27, 1996, denying his petition for writ of habeas corpus. The petitioner did not file a request for a certificate of appealability, and this matter was not brought to the court's attention until it received an order from the Eleventh Circuit Court of Appeals dated April 28, 1997, remanding the case for consideration of whether a certificate of appealability should be issued.[1]

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[1] *The standard for a certificate of probable cause is that the petitioner must "make a 'substantial showing of the denial of [a] federal right." Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394 (1983) (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), cert. denied, 406 U.S. 925, 92 S.Ct. 1796 (1972)). The Supreme Court further explained that ", in requiring a "question the

In April of 1996, 28 U.S.C.A. § 2253 was amended to provide that a "certificate of appealability" rather than a "certificate of probable cause" is necessary before a petitioner may pursue an appeal in a habeas corpus proceeding. To obtain a certificate of appealability the prisoner must make a "substantial showing of the denial of a constitutional right. 2 8 U. *S.* C 4 A. § 2253(c)(2). For recommendation of the United States Magistrate Judge, the court finds that the petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C.A. S 2253 (c)(2).

Accordingly, it is ORDERED that petitioner's motion for a certificate of appealability is denied.

DONE, this the 19th day of May, 1997.

_____

UNITED STATES DISTRICT JUDGE

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reasons given in the of some substance," or a "substantial showing of the denial of [a] federal right," obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further.'" " Id. at 893 n.4, 103 S.Ct. at 3394 n.4 (quoting Gordon v. Willis., 516 F. Supp. 911, 913 (N.D. Ga. 1980)).

IN THE UNITED STATES COURT OP APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 96-7046

ARZIE ELLIS, JR.,
Petitioner-Appellant,

Sept 11, 1997

versus

WALLACE F. HILL, Probation & Parole Officer,
WILLIAM C. YOUNG, Executive Director of Pardon & Parole Board of State of Alabama
JEFF SESSIONS, Attorney General for the State of Alabama,

Respondents-Appellees,

JAMES H. EVANS, Attorney General of the State of Alabama,

Respondent.

Appeal from the United States District Court for the Middle District of Alabama

ORDER:

Appellant's notice of appeal, construed as a motion for a certificate of probable cause, is DENIED.

/S/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

(Trial Transcript 415-421)

THE COURT:
Deputy Macon, I want to ask you, were you the officer involved when I had an occasion when I got a call about midnight one night, and I set a bond for a man from Notasulga. And a couple of hours later, I got a call where a Tuskegee police officer had rearrested that man, reworked the same charges and arrested him again? Were you involved in that incident?

DEPUTY MACON:
No, sir, I wasn't.

THE COURT:
Do you remember the incident?

DEPUTY MACON:
But I remember something about the occasion

THE COURT:
Do you remember which police officer it was?

DEPUTY MACON:
I remember calling --

THE COURT:
Do you remember which police officer was involved in that incident?

DEPUTY MACON:
No, sir. I don't remember which city officer was

involved.

THE COURT:
Officer Clements, was that you?

OFFICER CLEMENTS:
I believe we had a case similar to that, yeah.

THE COURT:
How's that?

OFFICER CLEMENTS:
I believe we had a case similar to that.

THE COURT:
Okay. Well, that left a very, very sour taste in my mouth toward whoever did that, and I left word in formic [sic] that police officer was not to arrest again. And the City of Tuskegee didn't have enough money to allow one of their officers to do that sort of thing. Because it arose out of a dispute over a woman, as I learned subsequently. And I just you know, I thought it would be well for me to share that experience I had.

Now, if that was Officer Clements that did that – and I believe that he's saying that it was him – then I think that the District Attorney's Office needs to know about that. And the City of Tuskegee, if they haven't already made note of it, needs to know about that. Because he used his badge, in effect, to protect his personal interest in that thing in a woman. And that did not set a good -
-

OFFICER CLEMENTS:
Judge, if you will --

THE COURT:
I don't want to hear another word out of you, Mr. Clements. I'm telling the lawyers about this. And I don't want that sort of stuff going on in my jurisdiction any more ever again. And I'm not entirely happy with what I've heard going on about the police work in this case, and I think that it's appropriate at this point in time for me to comment on that. Because it's not up to par.

The very idea of leaving the scene unattended at that time, and there were plenty of police officers there. And that's just not right. The district attorney has a tough enough time with the cases being properly worked to start with, let alone having to try cases where they were handled as they were in this case. I sympathize with the D.A.'s office for the preparation in this case, and I won't comment any further on that.

MR. MCARTHUR:
Your Honor, we met with the Assistant Chief Warren last night concerning some problems that have come up in this case and made him aware of certain things. And, Your Honor, since that time, the detective division has – they've set up a detective division, and a lot of the problems that occurred in this case, at least to my thinking, now don't occur.

THE COURT:
Okay. Well, that's good. Because this case is an

embarrassment to public justice in many ways. It's a case that has to go on and be tried. It's a serious matter. Somebody has been killed here. But, on the one hand, Officer Clements probably didn't have any responsibility to intervene simply because of his accidental presence. But his other conduct, you know, leads it to be a question of a way of handling it. If it wasn't appropriate for him to be involved in the case, then why did he inject himself into it and try to take the man's gun from him, you know, at that point in time. There are just all sorts of questions. Once you embark on a pattern of conduct that's loose and not professional, then it's very hard to get back on track is the unfortunate thing about it. Did officer Clements testify that at that point in time that there were only thirty or forty people in the club?

MR. MCARTHUR: Judge, somebody said there were thirty or forty. I don't -- I think he said forty to fifty.

THE COURT:
And he testified that he wasn't drinking. And Officer Clements is singled out among all of the witnesses. I have had a parade of witnesses come across the stand, and the one police officer who testified and was supposedly an eyewitness said that it was a very slack crowd that night. Everybody else knows that there were a couple hundred people in there.

Makes Officer Clements -- it makes it awfully tempting for the Court to read the charge that says, the Court charges the jury that if they believe from the evidence in this case that the witness Michael Clements has

willingly and corruptly swore falsely as to any material fact in the case, you may in your discretion disregard his testimony entirely.

I'm not going to give that charge, but I can understand why it was requested, having heard all of the evidence in the casa.

MR. MCARTHUR:
Judge, and not -- I think in defense of Sergeant Clements in this particular case, I think it's sort of like the dog chasing the car. And, when he catches it, what happens. I think at that point he was just trying to make the best of where he was after the shooting had occurred. I've had the pleasure of working with Officer Clements on a number of cases and --

THE COURT:
Well, I'm going to tell you something. Don't talk about your pleasure in working with a man that arrests somebody that I've just put out on bond on account of the fact that he and that person were squabbling over a woman. You know, I've had enough of that sort of stuff, and I'm surprised he's still on the force after that incident.

It's not customary to find people still on the force after a thing like that goes down, arid I made it known to the authorities that that's what has happened. I haven't gotten any more of those type calls since then. But I can 'understand how it could have happened since Officer demerits was spending his spare time down at the Turning Point, apparently not on any business.

(Lines 12, page 530 through lines 18, page 533)

JOHN MEADOWS, EXAMINATION (continued)
BY MR. RUSSELL:

"Q. Chief, you will recall our conversation this morning in talking about these rumors about Michael Clements and the business that we talked about. You recall our conversation about that?

THE COURT:
I'm not going to require him to testify about rumors.

MR. RUSSELL:
All right.

Q. Did you not tell me --

MR. RUSSELL:
Judge, and I would like to ask whether there's anything in the personnel record about this, is the point that I'm making.

Q. Did you not tell ine that you thought the way these rumors came about was that Michael Clements got a jobber's license and that he was going to pawn shops and buying property and bringing it back here and selling it? Did you tell me that?

CHIEF MEADOWS: Do you want to respond, Judge, to the question?

THE COURT:
Go ahead.

A. Okay. What happened, the situation was, there was some rumors --

Q. Please answer my question. Did you not tell me that?

A. Okay. What I told you this morning --

Q. Well --

THE COURT: Tell me what you told him this morning.

THE WITNESS:
Okay. What I told him this morning was that Clements had bought a jobber's license because he's a hustler. That's exactly what I told him. And I think what Mr. Russell is getting at, sir, is that there was some rumors out that he was buying and receiving stolen goods. If this was true, I would have made some recommendations myself. And I knew that I had not made -- I knew that nothing had come forth for me to reprimand him. And that's the reference that -- that's what it was. And I said, well, no doubt -- I was telling Mr. Russell, no doubt you have heard the rumors that I've heard. But I assured him at that time that these were just false rumors. Wasn't nothing to them.

THE COURT:
At any time has any information come to the attention of the District Attorney's Office, any way, shape, form or

fashion of any illegal on activity on the part of Clements?

MR. MCARTHUR:
No, Your Honor.

THE COURT:
Unless you've got some hard evidence, I'm just not going to go into that.

MR. RUSSELL:

Judge, I want to follow up on that jobber's.

THE COURT:
I don't see where that's material.

MR. RUSSELL:
Well, I object and I state my grounds for the objection.

THE COURT:
Go ahead.

MR. RUSSELL:
And I will have to -- this is what Chief Meadows told me. Is that he thought that was a reflection on the police department that a man would have a jobber's license in doing this, and that therefore he asked him to give him the jobber's license and quit doing that.

Q. Now, my question is, is there anything -- did you make a record of that in his personnel file? What's your answer?

A. No. Okay. It was no record because it was a one on -- basically a one-on-one conversation. Not that he had done anything wrong.

Q. But there's nothing in the personnel file about the fact that you thought he shouldn't have that jobber's license?

A. I think that's a public servant. It may tend to give someone a bad -- a wrong impression. Not that he had done anything wrong."